

## STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. M-06/09-325  
 )  
 Appeal of )

# INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that the petitioner sexually abused his younger cousin. The issues are whether the Department's decision is supported by a preponderance of the evidence and by the statutory definition of sexual abuse.

The following findings of fact are based on the testimony and other evidence admitted at the hearing in this matter held on October 20, 2009. The petitioner appeared *pro se* at the hearing with his mother.

## FINDINGS OF FACT

1. In April 2008 the Department received a report from a therapist that her patient, C., then a fourteen-year-old girl, had disclosed to her that the petitioner, her cousin, had sexually assaulted her when she was eleven or twelve. At the time, the petitioner would have been sixteen or

seventeen. The petitioner is now almost twenty-one. C. is now sixteen.

2. The Department's investigator who was assigned to this case testified that she had interviewed C. immediately after the report, and had followed up with interviews of C.'s therapist and social worker. She believes that C. has been consistent in her descriptions of the incident.

3. There does not appear to be any dispute in this matter that C. was also the victim of several sexual assaults by another older cousin, who has already been tried and convicted of having committed these crimes. C. alleges that during one of the assaults by this cousin, the petitioner was present, and participated himself in assaulting her.

4. C. testified at the hearing that when she was 11 or 12, during an assault by the older cousin, the petitioner was present and "took part in the abuse" by putting his fingers into her vagina. She stated that this had happened against her will.

5. C.'s demeanor at the hearing was nervous and frightened, but she was cooperative and responsive during the Department's questioning. Her testimony was credible.

6. The petitioner at all times, including in his minimal testimony at the hearing, has denied that the

incident ever happened. He and his mother admit, however, that there were occasions when he, C., and the other cousin were alone together during the time in question.

7. At no time has the petitioner alleged a possible motive for C. to have fabricated the allegation and to have continued to cooperate, much to her obvious duress, during the ensuing investigation and hearing.

8. Prior to the hearing itself, the hearing officer had held several telephone status conferences with the petitioner, his mother, and the Department's attorney. The hearing had originally been set for September 29, 2009. Prior to that date the hearing officer had denied the Department's requests to introduce hearsay evidence and to make special accommodations for the taking of C.'s testimony.<sup>1</sup> Following that ruling the parties agreed that the hearing would be continued, but that another telephone status conference would be held on September 29 at the same 9 a.m. time for which the hearing had been scheduled.

During this status conference the Department's attorney informed the petitioner and the hearing officer that C. was extremely frightened and intimidated about confronting the

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<sup>1</sup>The basis of the hearing officer's ruling, which the Department later conceded, was that the age requirements of VRE §§ 804a and 807 were not met.

petitioner, but that she would nonetheless be appearing as a witness for the Department at the hearing, which was then rescheduled for October 20, 2009.

9. At the hearing it was related that at 9:45 a.m., immediately following the telephone status conference on September 29, the petitioner had gone to C.'s school, and had been seen by her in the hallway, causing C. to become extremely upset and leading her to seek a Protective Order against the petitioner from Family Court, which was granted and remains in effect until October 2010.

10. C. also testified that the petitioner had recently driven by her in his car on two occasions when she was walking home from school.

11. At the hearing the petitioner admitted that he had graduated from C.'s school in Spring 2008, and that he had only been back to the building on one other occasion. He testified that he had nonetheless chosen to go to the school on September 29, 2009 "to see a teacher".

12. The petitioner's denials of any intent to intimidate C. in this proceeding are not credible. Moreover, these attempts severely undermine his denials of the incident of sexual abuse.

ORDER

The Department's decision substantiating the report of sexual abuse is affirmed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct

involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, the petitioner denies that he ever engaged in sexual acts with C. He does not question that the act alleged by C., if it occurred, would be considered sexual abuse under the above statute. In a *de novo* hearing it is the Department's burden of proof to establish the facts of an allegation by a preponderance of evidence. In most cases, certainly this one, the relative credibility of the witnesses is crucial.

As noted above, C. was deemed to be a credible witness. She has been consistent in her allegation, and there is no credible evidence calling into question either the timing or the circumstances in which she alleges the incident happened. There is also no basis to question her motives in making the allegation and in continuing her cooperation with the Department during the petitioner's appeal. For the reasons noted above, the petitioner's denials are deemed not to be credible.

Therefore, the Department's decision substantiating the report in question as one of sexual abuse must be affirmed.

3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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